

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
vs.)	Appeal No. SC84078
)	
REGINALD WESTFALL,)	From the Circuit
)	Court of St. Louis City
Appellant.)	Cause No. 991-3679

APPEAL FROM CIRCUIT COURT OF ST. LOUIS CITY
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19
HONORABLE TIMOTHY J. WILSON, PRESIDING

APPELLANT’S SUBSTITUTE BRIEF

Dave Hemingway
Attorney for Appellant
1139 Olive, Suite 200
St. Louis, MO 63101
(314) 340-7640

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	5
POINTS RELIED ON	14
ARGUMENT	18
POINT 1 - Denial Of Proper Self-Defense Instruction	18
POINT 2 - Failure to Hear New Evidence	36
CONCLUSION	44
Appendix (Instruction Z; L.F. 133-134)	

Abbreviations

L.F. - Legal File;

Tr. 1 – Trial Transcript, Volume I

Tr. 2 – Trial Transcript, Volume II

Sent. T. - Sentencing Transcript

TABLE OF AUTHORITIES

<u>Mooney v. Holohan</u> , 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) .	43
<u>Napue v. Illinois</u> , 360 U.S. 364, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)	43
<u>Donati v. Gualdoni</u> , 358 Mo. 667, 216 S.W.2d 519 (1949)	39
<u>State v. Allen</u> , 800 S.W.2d 82 (Mo. App. W.D. 1990)	32
<u>State v. Allison</u> , 845 S.W.2d 642 (Mo. App. W.D. 1992)	36
<u>State v. Bledsoe</u> , 920 S.W.2d 538 (Mo. App. E.D. 1996)	28
<u>State v. Chambers</u> , 671 S.W.2d 781 (Mo. banc 1984)	19
<u>State v. Coffman</u> , 647 S.W.2d 849 (Mo. App. W.D. 1983)	39
<u>State v. Davis</u> , 698 S.W.2d 600 (Mo. App. E.D. 1985)	40
<u>State v. Isa</u> , 850 S.W.2d 876 (Mo. banc 1993)	30
<u>State v. Hopson</u> , 891 S.W.2d 851 (Mo. App. E.D. 1995)	23
<u>State v. McCauley</u> , 831 S.W.2d 741, 743 (Mo. App. E.D. 1992) ..	41-42
<u>State v. Mooney</u> , 670 S.W.2d 510 (Mo. App. E.D. 1986) .	38, 39, 40, 43
<u>State v. Moseley</u> , 705 S.W.2d 613 (Mo. App. E.D. 1986)	29
<u>State v. Post</u> , 804 S.W.2d 862 (Mo. App. E.D. 1991)	40
<u>State v. Redmond</u> , 937 S.W.2d 205 (Mo. banc 1996)	23, 29, 32
<u>State v. Santillan</u> , 948 S.W.2d 574 (Mo. banc 1997)	29
<u>State v. Weems</u> , 840 S.W.2d 222 (Mo. banc 1992)	23
<u>State v. White</u> , 622 S.W.2d 939 (Mo. banc 1981)	30

<u>State v. Westfall</u>, No. ED78013 (Mo. App., Sept. 4, 2001) . . .	26, 28, 29
<u>State v. Williams</u>, 673 S.W.2d 847 (Mo. App. E.D. 1984)	40
<u>Strickland v. Washington</u>, 466 U.S 664, 104 S.Ct. 2052 (1984)	32
MAI-CR3D 306.06, and Notes on Use, 4(b)(4)	20, 21, 27, 29-30
Rule 28.02(f);	23
Rule 29.11(b)	38
Section 563.031 RSMo. 1994;	19, 20, 26
Section 563.011.1(1) RSMo. 1994);	20, 21. 26

JURISDICTIONAL STATEMENT

Reginald Westfall brought this appeal to challenge his conviction of assault in the first degree, armed criminal action, misdemeanor property damage, and misdemeanor assault following a jury trial in the City of St. Louis. The Missouri Court of Appeals, Eastern District, issued an opinion upholding the conviction, while one member, Sr. Judge Charles Blackmar, dissented as to Point I. The Missouri Supreme Court granted transfer pursuant to Rule 83.04. Appellant challenges the trial court's denial of an instruction submitting self-defense based on mere use of force as well as the use of deadly force. Appellant also challenges the denial of a hearing on newly discovered evidence of perjury by the prosecuting witness. This Court has jurisdiction to hear this appeal pursuant to Article V, Section 3, of the Missouri Constitution and Section 547.070 RSMo. 1994.

STATEMENT OF FACTS

Reginald Westfall maintained his innocence of 10 criminal counts, all based on accusations by his ex-wife, Tracie Westfall, and her sometime boyfriend, Robert Jenkins (Tr. 1: 8-9). The jury acquitted Reginald of 6 counts (L.F. 91), but convicted him of assault and armed criminal action against Jenkins on February 2, 1999 plus two misdemeanors relating to other incidents (L.F. 122-123). Reginald testified he acted in self-defense to an assault initiated by Jenkins (L.F. 122-123, Tr. 2: 96-99). Reginald said he feared serious injury or death at Jenkins' hands because Jenkins' had struck him in the head with a jack handle on June 26, 1998 (Tr. 2: 34-36). Jenkins testified in rebuttal that he did not hit Reginald on June 26 (Tr. 2: 129-131). Jenkins testified he sustained cuts leaving permanent scars about his head and neck (Tr. 1: 411-12). The doctor who treated and released Jenkins said the cuts were "superficial" and not "life-threatening" (Tr. 1: 372, 383).

Reginald requested Instruction Z, which submitted self-defense based either on a finding that Reginald used non-deadly force or that he used and was justified in using deadly force (L.F. 133-134). Judge Timothy J. Wilson denied this instruction and submitted self-defense based only on a finding that Reginald used and was justified in using deadly force (L.F. 92-93).

In greater detail, the facts follow.

Reginald and Tracie Westfall married in 1994 and had 4 children including Regina and Shaconda (nicknamed Shay-Shay) (Tr. 1: 188-189). The couple separated for a year, during which time Tracie began dating Robert Jenkins (Tr. 1: 188-189). Jenkins knew Tracie was married to Reginald and Reginald knew Tracie was dating someone (Tr. 1: 189-190). Reginald and Tracie reunited in 1998 to try to salvage their marriage (Tr. 1: 188-189, 190-191). Reginald learned Jenkins' identity after he reunited with Tracie (Tr. 1: 191). Tracie claimed her relationship with Jenkins ended when Reginald returned (Tr. 1: 189-190), but she still phoned Jenkins whenever she could (Tr. 1: 250, 413). Tracie and Reginald argued about Jenkins, and Tracie claimed the arguments got physical (Tr. 1: 191-192).¹

Tracie left Reginald in January 1999 and took the children to stay with Jenkins in a hotel (Tr. 1: 229, 395-396, 415). Tracie kept the children out of school on February 1, because she did not want Reginald to find them (Tr. 1: 229). On February 2, Jenkins and Tracie drove the children to their schools in the Westfalls' Pontiac (Tr. 1: 229-230, 396, 415). They left the boys at

¹ Reginald was charged with misdemeanor assault based on Tracie's claim that he choked her on July 16, 1998 (Tr. 1: 192-193, 272-273). Reginald was convicted of this misdemeanor plus misdemeanor property damage and received time served for those counts (L.F. 112, 127, 131; Sent. Tr. 27).

their schools by 8:30 a.m., and then they went shopping with the girls (Tr. 1: 230-231, 397). At about 12:30, they took Regina to St. Pius School, a few blocks from the Westfall home (Tr. 1: 231, 270, 398, 415). Tracie took Regina inside and stayed there 10 minutes, while Jenkins and Shaconda waited in the car (Tr. 1: 232, 268, 269, 398).

Jenkins testified he sat in the driver's seat of the Pontiac with his foot on the brake and the car in gear, because he thought Tracie was coming right back (Tr. 1: 399). Jenkins said he leaned between the front bucket seats to give Shaconda some food in the back seat (Tr. 1: 399-400, 417). The passenger door opened and Reginald entered (Tr. 1: 400-401). Jenkins claimed Reginald was reaching in his pocket as he got in (Tr. 1: 405-406). Jenkins asserted that Reginald said "I'm going to teach you about messing with my wife" (Tr. 1: 401, 405, 406). Jenkins claimed Reginald started cutting him with a "carpenter-look knife" while Jenkins was stuck between the front seats and before he could "even get ready to swing and hit him" (Tr. 1: 402, 406). Jenkins said he suffered three cuts before he got to where he could pull Reginald back in the seat "and that's when I threw my first lick" (Tr. 1: 402, 423, 424). Jenkins said his foot came off the brake and the car rolled through a fence and hit a wall (Tr. 1: 402-403). Jenkins said he

got out and ran to a nearby library, as Reginald came around toward him (Tr. 1: 405, 427).

Jenkins sustained 6 lacerations on his face and one ear (Tr. 1: 371). His doctor called the lacerations as “superficial” and found no nerve damage (Tr. 1: 372). Jenkins testified the scars resulting from the cuts would remain for life (Tr. 1: 372-373, 382, 412). Jenkins’ said his face was sore, and he experienced trouble chewing, for a week (Tr. 1: 410, 413).

Tracie Westfall’s sister, Cutina Peebles, testified that Reginald called her on February 2 and “said that he got that nigger and that my sister was next because we were playing games.” (Tr. 1: 289, 290). Cutina did not call police about any such threat (Tr. 1: 295). Gwendolyn Peebles, Tracie’s mother, told the jury that Reginald contacted her on February 2, 1999 and said “mom, . . . I took care of that so-and-so, S-B” (Tr. 1: 301-302). Leon White testified that he drove Reginald to a job interview the morning of February 2 (Tr. 1: 388-389). Later that day, Reginald came to White’s house with Shaconda (Tr. 1: 386-387). Reginald told him he had just had a “consignment” with a fellow in the car, meaning Jenkins (Tr. 1: 387-388).

Reginald's Testimony in Defense

Reginald testified that he acted in self-defense when Jenkins' attacked him on February 2, 1999, and that he feared serious injury or death at Jenkins' hands since Jenkins had previously struck Reginald in the back of the head with an iron jack handle on June 26, 1998 (Tr. 2: 29-30, 35-37).

Reginald testified that on the morning of February 2, 1999, he wore overalls with tools in his pocket, including a carpet knife, in case he was offered immediate work at a job interview he had that morning (Tr. 2: 19-21, 56-60). Reginald returned home from the interview just before noon (Tr. 2: 19-22, 58-60, 62). Reginald walked to nearby St. Pius school to see if his children were there (Tr. 2: 21-23, 93). He saw the family Pontiac outside St. Pius and decided to wait to ask Tracie about driving it to his new job (Tr. 2: 24). Reginald looked at the playground to see if his daughter was there as he approached the Pontiac and did not see anyone inside the car (Tr. 2: 25, 63).

As Reginald entered the passenger door, he saw Jenkins leaning over the passenger floor area, where the contents of Tracie's purse were strewn (Tr. 2: 25, 63). Reginald told Jenkins to leave the car (Tr. 2: 25). Reginald said Jenkins began to reach for the door handle (Tr. 2: 26). Reginald then heard his infant daughter, Shaconda, call to him from the back seat and, as he looked back to her, Jenkins "just started beating the hell out of me." (Tr.

2: 26, 64-65). Reginald said his door was open with his leg hanging out as he tried to fend off Jenkins' blows (Tr. 2: 26, 65-66). Jenkins blows dazed appellant and bloodied his left eye, impairing his vision (Tr. 2: 26).

Reginald said the car started up and lunged forward, pulling him toward the door and the door against his leg as the car jumped the alley curb and hit a wall (Tr. 2: 26-27, 69-70). Reginald was thrown into the windshield and then fell back (Tr. 2: 28). Reginald said Jenkins knelt over him and beat him (Tr. 2: 28). Reginald said he tried to push Jenkins away but the seat-back fell, leaving Jenkins on top of Reginald and the seat-back on top of Shaconda (Tr. 2: 28, 75-76). Jenkins ignored Reginald's request that he stop the beating (Tr. 2: 28). Reginald reached around to push Shaconda out from under the collapsed seat-back (Tr. 2: 28). Jenkins continued his attack and began punching Reginald with what felt like a hard object (Tr. 2: 29, 76-77). Reginald then reached for a tool in his pocket and grabbed a utility knife (Tr. 2: 29, 78-79, 81). Reginald cut Jenkins with it and again told him he had had enough (Tr. 2: 29, 83-84). Jenkins ceased his attack and fled (Tr. 2: 30, 84).

Reginald left in the car with Shaconda and later turned himself in (Tr. 2: 30, 94-95). Reginald told the police upon his arrest that he acted in self-defense against Jenkins' attack (Tr. 2: 95-96).

Reginald explained at trial that he feared for his life when Jenkins attacked him in the car because of the ferocity of Jenkins' assault and because of Jenkins' previous attack on him the previous summer (Tr. 2: 96, 98-99). This prior attack occurred the week after Reginald moved back in with Tracie (Tr. 2: 34-35). Reginald testified that Tracie's brother, Torey Peebles, accosted him in the back yard (Tr. 2: 34-35). Torey struck Reginald to his knees, knocked the wind out of him, and bloodied Reginald's left eye (Tr. 2: 35). Reginald continued that Jenkins jumped over the back fence, after which Reginald felt a sharp pain in the back of his head (Tr. 2: 35). Reginald said he then saw Jenkins standing over him with a 24-inch jack handle (Tr. 2: 35). Jenkins said something about teaching Reginald a lesson and struck Reginald's back (Tr. 2: 35). Jenkins and Torey fled with Tracie (Tr. 2: 37). Reginald required 5 staples to close his head wound and his left eye was bloodied (Tr. 2: 36). Jenkins was arrested for assaulting Reginald on June 26, but the judge at Reginald's trial excluded references to Jenkins' arrest (Tr. 2: 32-34).

Jenkins testified in rebuttal that he did not strike Reginald with a jack handle on June 26, 1998 (Tr. 2: 131). Jenkins claimed he saw Torey Peebles hitting Reginald and that he stopped Torey's assault (Tr. 2: 129-130).

The jury convicted Reginald of first degree assault on Jenkins and armed criminal action (L.F. 122-123).

Prior to sentencing, Reginald filed a pro se “supplemental motion for new trial”, alleging that the state knowingly presented false and perjured testimony by Jenkins (L.F. 137). The motion cited a police report filed upon Jenkins’ arrest for assaulting Reginald on June 26, 1998 (L.F. 137-138).

The report indicated that Tracie told police she saw Torey Peebles and Jenkins strike Reginald with their fists and then leave (L.F. 137-138, 143).

Reginald’s pro se motion cited these pretrial statements as proof Jenkins perjured himself when he denied assaulting Reginald (L.F. 137-138).

Reginald also cited the statements as proof that Tracie perjured herself at her deposition when she denied seeing Jenkins assault Reginald on June 26, 1998 (L.F. 137-138). Reginald attached a copy of a police report of the June 1998 incident, which recorded that Tracie told the police “she would not cooperate with prosecution in [the June 26, 1998] case” (L.F. 143).

Reginald filed another pro se supplement seeking a new trial, after the deadline for new trial motions passed (L.F. 137-144). Reginald cited and attached a copy of a statement Tracie wrote after trial declaring that she did see Jenkins hit Reginald with a jack handle (L.F. 154). Tracie also wrote:

I told you why I didn't tell the truth about what happen in the back yard but, like I told you before did you think I was going keep letting you abuse me[?] you were willing to have me tell what he did to you but you don't want to tell what you have done to me. What happened in the back yard was wrong with my brother and him but, me not telling the truth let you tell it you being falsely accused and everybody is lying on Reggie. But Reggie doesn't tell lies[;] never told one lie in his life[.] you have told lies in that courtroom but, you know I know you[.] I know you had tell lies to defend yourself.

(L.F. 156-157)

Just before sentencing, Reginald drew the court's attention to Tracie's post-trial letter (Sent. T. 5). Reginald asked to produce Tracie's sworn testimony to confirm the content of the letters (Sent. T. 5-6). The Court told Reginald to pursue the issue on direct appeal or under Rule 29.15 (Sent. T. 7-8).

Judge Wilson sentenced Reginald to concurrent sentences of 20 years for assault in the first degree against Robert Jenkins (Count 1) and armed criminal action based on that assault (Count 2) (Sent. T. 27). The court imposed "time served" for the 2 misdemeanors (Sent. T. 27).

POINTS RELIED ON

I.

Judge Wilson erred in refusing the self-defense Instruction Z, contrary to the 6th and 14th Amendment due process rights to put on a defense in a fair trial and to confront the state's charge, because MAI-CR 3D 306.06, Notes on Use 4(b)4 required that the jury be instructed on self-defense based on non-deadly force as well as deadly force in that Reginald testified he only sought to get Jenkins off while he was dazed and vision-impaired, and the doctor testified Jenkins' shallow cuts were not serious or life-threatening. Reasonable jurors could conclude from this Reginald had no purpose to inflict, or knowledge of creating a substantial risk of inflicting, serious physical injury. The error was not harmless since the jury was not told it could find self-defense on less than a justified use of deadly force here. Jurors may have doubted the reasonableness of Reginald's belief he faced imminent death/serious injury and rejected self-defense not knowing that reasonable use of non-deadly force could also support finding self-defense to Count 1.

MAI-CR3D 306.06, and Notes on Use, 4(b)(4);

Section 563.031 RSMo. 1994;

State v. Hopson, 891 S.W.2d 851 (Mo. App. E.D. 1995);

State v. Bledsoe, 920 S.W.2d 538 (Mo. App. E.D. 1996);

State v. Redmond, 937 S.W.2d 205 (Mo. banc 1996);

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

State v. Isa, 850 S.W.2d 876 (Mo. banc 1993);

Rule 28.02(f);

State v. White, 622 S.W.2d 939 (Mo. banc 1981);

Section 563.01.1(1) RSMo. 1994);

State v. Moseley, 705 S.W.2d 613 (Mo. App. E.D. 1986);

State v. Chambers, 671 S.W.2d 781 (Mo. banc 1984);

Strickland v. Washington, 466 U.S. 664, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984);

State v. Allen, 800 S.W.2d 82 (Mo. App. W.D. 1990);

State v. Westfall, No. ED78013, Slip Op. (Mo. App. E.D.,

September 4, 2001).

II.

Judge Wilson erred in failing to conduct a hearing on the newly discovered evidence of Tracie Westfall's statement that she saw Jenkins assault Reginald with a jack handle on June 26, 1998, in violation of appellant's 6th and 14th Amendment rights to due process and a fair, reliable trial, in that the newly discovered evidence betrays the perjury in Jenkins' rebuttal testimony denying his June 26, 1998 assault on Reginald as well as Tracie's own perjury at deposition. The late discovery did not stem from a lack of due diligence since Tracie lied to police and in her deposition when she said she did not see the assault. The newly discovered evidence is not cumulative because the issues of self-defense and Reginald's belief that it was necessary were disputed throughout trial. The newly discovered evidence supports a reasonable probability of a different result by corroborating Reginald's claim through a hostile, prosecuting witness whose bias favored Jenkins.

State v. Mooney, 670 S.W.2d 510 (Mo. App. E.D. 1986);

State v. McCauley, 831 S.W.2d 741, 743 (Mo. App. E.D. 1992)

State v. Post, 804 S.W.2d 862 (Mo. App. E.D. 1991);

State v. Allison, 845 S.W.2d 642 (Mo. App. W.D. 1992).

State v. Williams, 673 S.W.2d 847 (Mo. App. E.D. 1984).

Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791

(1935);

Napue v. Illinois, 360 U.S. 364, 79 S.Ct. 1173, 3 L.Ed.2d 1217

(1959);

Rule 29.11(b);

State v. Coffman, 647 S.W.2d 849 (Mo. App. W.D. 1983);

Donati v. Gualdoni, 358 Mo. 667, 216 S.W.2d 519 (1949);

State v. Davis, 698 S.W.2d 600 (Mo. App. E.D. 1985).

ARGUMENT

I.

Judge Wilson erred in refusing the self-defense Instruction Z, contrary to the 6th and 14th Amendment due process rights to put on a defense in a fair trial and to confront the state's charge, because MAI-CR 3D 306.06, Notes on Use 4(b)4 required that the jury be instructed on self-defense based on non-deadly force as well as deadly force in that Reginald testified he only sought to get Jenkins off while he was dazed and vision-impaired, and the doctor testified Jenkins' shallow cuts were not serious or life-threatening. Reasonable jurors could conclude from this Reginald had no purpose to inflict, or knowledge of creating a substantial risk of inflicting, serious physical injury. The error was not harmless since the jury was not told it could find self-defense on less than a justified use of deadly force here. Jurors may have doubted the reasonableness of Reginald's belief he faced imminent death/serious injury and rejected self-defense not knowing that reasonable use of non-deadly force could also support finding self-defense to Count 1.

Judge Wilson erred in denying appellant's Instruction Z on self-defense because the evidence presented a factual question of whether Reginald used only non-deadly force to the extent necessary to protect

himself, or whether he resorted to deadly-force in the reasonable belief it was necessary to avoid death or serious physical injury at the hands of Robert Jenkins (Tr. 2: 126; L.F. 133-134). Reginald testified he only sought to stop Robert Jenkins' relentless attack when he reached in his pocket for something to fend off the attack and held up the box knife (Tr. 2: 30, 97). The doctor who treated and released Jenkins testified that Jenkins' wounds consisted of superficial cuts that were not deep, "serious or life-threatening" (Tr. 1: 372, 383). This evidence supported a finding that Reginald did not use "deadly force" to defend himself.

The instruction Judge Wilson gave the jury on self-defense (Instruction 20) impaired appellant's defense by authorizing a finding of self-defense for assault in the first degree (Count I) only on proof satisfying the more stringent threshold required to justify deadly force (L.F. 92-93).

The Law Authorizing Right of Self-Defense

"The right of self-defense is a person's privilege to defend himself against personal attack." **State v. Chambers, 671 S.W.2d 781, 783 (Mo. banc 1984)**. The parameters of self-defense appear in Section 563.031 RSMo. 1994.² Subsection 1 articulates the general right of a person to "use

² All statutory citations are to RSMo 1994 unless otherwise indicated.

physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself”. Subsection 2 addresses the more stringent showing needed to justify the use of “deadly force” in self defense. Deadly force is defined as “[p]hysical force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious physical injury.” Section 563.011.1(1) RSMo. A person may not use deadly force in self-defense “unless he reasonably believes that such deadly force is necessary to protect himself or another against death or serious physical injury”. Section 563.031.2 RSMo.

The question of whether the defendant used deadly force “depends not only on the amount of force used, but also on the defendant’s purpose to cause, or awareness of the likelihood of causing, death or serious physical injury.” MAI-CR 3D 306.06, Notes on Use, Note 4(b).

**MAI-CR 3d Requires Disjunctive Submission on Use of
Non-Deadly Force OR Deadly Force When Factual Issue Exists**

The pattern instruction for submitting self-defense appears in MAI-CR3d 306.06. The MAI presents alternative phraseology for the “Specific Instructions” part of the form wherein the jury is told what it must find to

conclude self-defense applies to the charge at hand. MAICR3d 306.06, Notes on Use, Note 4. The Notes point out that in most cases, no dispute exists as to whether a defendant did or did not use deadly force. MAICR3D 306.06, Notes on Use, Note 4(b). Quoting Section 563.01.1(1) RSMo, the Note 4(b) further observes that

the question of whether deadly force was used depends **not only** on the amount of force used **but also on the defendant's purpose to cause, or awareness of the likelihood of causing,** death or serious physical injury. **In some cases, there will be a question as to whether the defendant had such a purpose or awareness. The fact that death or serious physical injury did or did not result from the defendant's conduct does not necessarily mean there is no issue as to the use of "deadly force."** (Emphasis added).

The Notes on Use further observe that if a defendant “did not have as his purpose the causing of death or serious physical injury and was not aware that such injuries were likely, he has not used ‘deadly force.’” MAICR3d 306.06, Notes on Use, Note 4(b).

Note 4(b)(4) provides that the alternative pattern form set out in part [D] of the instruction will be used “[w]hen there is some evidence that the defendant used deadly force and there is an issue as to whether the defendant

used deadly force and there is also evidence supporting the use of deadly force in self-defense”.

Defense counsel here submitted Instruct Z, including the language from variant [D] in this part of the instruction (L.F. 133-134). In pertinent part, Instruction Z stated:

If the defendant reasonably believed he was in imminent danger of harm from the acts of Robert Jenkins and he used only such non-deadly force as reasonably appeared to him to be necessary to defend himself, then he acted in lawful self-defense, or if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of Robert Jenkins and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was in lawful self-defense.

(L.F. 133-134; Appendix).

Judge Wilson denied appellant’s request to use this language in submitting self-defense and instead submitted Instruction 20, which only authorized a finding of self-defense upon a greater showing that deadly force was justified:

If the defendant was not the initial aggressor in the encounter with Robert Jenkins,

And if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of Robert Jenkins and he reasonably believed that the use of deadly force was necessary to defend himself, then he acted in lawful self-defense. (L.F. 92; Appendix A). Instruction 20 and appellant's requested Instruction Z were in all other respects identical (L.F. 92-93, 133, 134).

Standard of Review

"A defendant is entitled to an instruction on any theory which the evidence tends to establish." **State v. Hopson, 891 S.W.2d 851, 852 (Mo. App. E.D. 1995)**. Whenever an MAI-CR instruction is applicable under the law and Notes on Use, the MAI-CR instruction shall be given to the exclusion of any other. **Rule 28.02(f)**. A challenge to the denial of an instruction, or a particular form thereof, requires the reviewing court to view the evidence in the light most favorable to the requested instruction. **State v. Weems, 840 S.W.2d 222, 226 (Mo. banc 1992)**. When the evidence supports differing conclusions, the instructions should inform the jury as to each alternative. **See State v. Redmond, 937 S.W.2d 205, 209-210 (Mo. banc 1996)**.

Evidence Supported Finding Reginald did not use Deadly Force

Viewed in a light most favorable to Instruction Z, the evidence supported alternative findings that Reginald either did not use deadly force or that he was justified in using deadly force. Reginald testified he walked from his home to a nearby school that one of his children attended (Tr. 2: 21-23). Reginald had just come from a second job interview with a waterproofing company and he was carrying tools in his pocket, including a carpet knife, because he was told he might be asked to start work that day (Tr. 2: 19-20, 56-58). The jury could find that Reginald had not contemplated using the knife as a weapon when he carried it.

Reginald saw his wife's Pontiac parked on the school lot and thought he would ask about using it for his new job (Tr. 2: 24). Reginald looked for his daughter among the children playing outside the school and he did not see anyone in the car as he approached it (Tr. 2: 25, 63). Jenkins himself testified he was leaning down between the front bucket seats when the passenger door opened (Tr. 1: 399-401, 417). Reginald testified that as he got in the car he saw Jenkins leaning down over the contents of Tracie Westfall's purse (Tr. 2: 25, 63). Reginald sat on the passenger side, with his right leg still outside the door, and told Jenkins to leave the car (Tr. 2: 25, 64, 65). Jenkins appeared to start to get out and Reginald heard his infant

daughter call him from the back seat (Tr. 2: 26, 75). As Reginald looked back to her, Jenkins “full force, full range, just started beating the hell out of [Reginald]”, and ultimately made use of something that felt like a hard object (Tr. 2: 26, 68-69, 29).

Jenkins continued to pummel Reginald as the car rolled through the playground and struck an alley wall (Tr. 2: 27). Reginald hit the windshield and fell back and Jenkins ended up on top of Reginald continuing the beating (Tr. 2: 28, 79). This caused the right front seat to collapse (Tr. 2: 28). Reginald testified he was in no condition to fight due to his medical disabilities to his elbow and lower back and he tried unsuccessfully to fend off Jenkins’ blows (Tr. 2: 28, 36). Jenkins ignored Reginald requests that he stop his attack and Reginald reached in his pocket for something to help repel Jenkins, but he testified he did not reach for any “certain item” among the tools he was carrying (Tr. 2: 29, 97). Reginald came up with the carpet knife (Tr. 2: 29, 97). Reginald made several quick strikes with the knife, inflicting superficial cuts to Jenkins face and neck, whereupon the victim fled (Tr. 1: 383; Tr. 2: 29, 83).

This evidence supported a finding that Reginald did not use deadly force and that, as Reginald directly testified, he was “just trying to get

[Jenkins] off me.” (Tr. 2: 30, 97). A conclusion that Reginald used deadly force required a finding that he acted with a purpose to cause death or serious physical injury or that he knowingly created a substantial risk of causing death or serious physical injury. Section 563.031.1(1) RSMo. Reginald’s direct testimony about his mental state asserted no purpose other than to “get [Jenkins] off me” (Tr. 2: 30, 97). This testimony, if credited, negated the “purpose to cause death or serious physical injury” necessary for a finding of deadly force. The examining physician’s testimony that Jenkins’ shallow cuts were superficial in that they were neither deep nor “serious or life-threatening” corroborates Reginald’s assertion of his non-deadly purpose (Tr. 1: 372, 383).

The evidence also supports a finding that Reginald did not use force that he knew “to create a substantial risk of causing death or serious physical injury.” Section 563.011.1(1) RSMo. The foregoing evidence also supported a finding that Reginald was overpowered by Jenkins’ incessant pummeling and that Reginald spontaneously used the only means at hand to protect himself, without an opportunity for reflection on the possible consequences.” **State v. Westfall, No. ED78013, Blackmar, Sr. J., dissenting at 4 (Mo. App. E.D., September 4, 2001).** Reginald testified that Jenkins continued beating him throughout the incident and rendered

Reginald “dazed” (Tr. 2: 26). Jenkins’ fusillade of punches impaired Reginald’s vision by bloodying Reginald’s left eye (Tr. 2: 26, 67). Reginald testified he already had medical disabilities to his left elbow and lower back as a result of Jenkins’ prior assault on him with a jack handle (Tr. 2: 28, 36). Reginald also testified his attention was diverted by concern for his infant daughter who was caught beneath the collapsed seat (Tr. 2: 28-29). From this, a reasonable juror could find that Reginald did not knowingly create a substantial risk of causing death or serious physical injury and that his injuries from Jenkins’ attack impaired his ability to recognize any such risk.

A jury question existed, therefore, as to whether Reginald used deadly force. The foregoing evidence supported a finding that Reginald did not resort to deadly force. The jury was free to believe or disbelieve all or parts of each witness’s testimony and, admittedly, the jury could alternatively have concluded that Reginald acted with the purpose of seriously injuring Jenkins believing it necessary in light of Jenkins previous, deadly attack on Reginald with a jack handle (Tr. 2: 29-30, 35-37). Instruction Z submitted the issue of whether Reginald used non-deadly or deadly force, using the precise language mandated when this factual question arises. MAI-CR3D 306.06, Notes on Use, 4(b)(4).

The majority opinion by the Court of Appeals upheld the denial of this instruction, concluding that since Jenkins was cut on the head and neck with a knife, the evidence compelled a finding that he used deadly force. **State v. Westfall**, No. ED78013, Slip Op. at 7, Majority Opinion of Hoff, J.). The majority opinion goes beyond the holdings of the cases on which it based its conclusion.

The opinion in **State v. Bledsoe**, 920 S.W.2d 538 (Mo. App. E.D. 1996), ruled on Bledsoe's claim that the evidence failed to support any finding of serious physical injury. 920 S.W.2d at 540. The evidence there revealed that Bledsoe slashed a broken beer bottle across the chins of two patrons at a restaurant (for no apparent reason). The court noted that the two victims sustained scars that were visible and permanent, so they could qualify as "serious disfigurement" and serious physical injury. **Id.** Yet the **Bledsoe** majority noted that "[I]njuries suffered by assault victims will differ and therefore whether a victim suffers serious disfigurement is dependent upon the evidence of a particular case." 920 S.W.2d at 540 [7]. The **Bledsoe** decision did not suggest the trier of fact could **only** find serious physical injury, much less deadly force under the self-defense statute, when any scar results (no matter how superficial).

The Court of Appeals' majority also mistakenly relied on State v. Moseley, 705 S.W.2d 613, 617-618 (Mo. App. E.D. 1986), to hold that Reginald should have realized he was creating a substantial risk of serious physical injury by using a knife. State v. Westfall, No. ED78013, Slip Op. at 7. The question in Moseley was whether the state presented a prima face case of second degree assault. Viewing the evidence strictly in favor of the conviction, the court held that Moseley's firing of a gun twice at a door behind which he suspected a prowler stood sufficed to prove reckless conduct done in conscious disregard of the risk of injuring another. Moseley sheds no light here.

This Court's prior opinions have increasingly emphasized the value of submitting alternative theories when supported by the evidence. E.g., State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997); State v. Redmond, 937 S.W.2d at 209-210. The evidence in this trial supported differing interpretations, including alternative findings that (1) Reginald did not use deadly force, or (2) Reginald did use deadly force and was justified in doing so (particularly in light of Jenkins' deadly attack on Reginald's head with a jack handle a few months before; Tr. 2: 29-30, 35-37). This being so, the Notes on Use clearly compelled submission of paragraph [D] in the Specific

Instructions part of the self-defense charge. **MAI-CR3d 306.06, Notes on Use 4(b).**

Denial of Instruction Z Impaired Appellant's Defense

Failure to comply with the Missouri Approved Instructions and the applicable Notes on Use is presumed to be prejudicial unless the contrary is clearly shown. **State v. White, 622 S.W.2d 939, 943 (Mo. banc 1981).**

The prejudicial effect of non-compliance is judicially determined. **Rule 28.02(f).** A defendant is prejudiced by an erroneous instruction when the jury may have been adversely influenced by it. **State v. Isa, 850 S.W.2d 876, 902 (Mo. banc 1993).**

The record in this case precludes a finding of harmless error. Reginald's testimony that he simply sought to get Jenkins to stop beating him (Tr. 2: 29, 30, 83) and the evidence that the shallow cuts Jenkins suffered were superficial and caused no nerve damage (Tr. 2: 372, 383) supported a finding that Reginald did not intend to inflict death or serious physical injury. Reginald's testimony that Jenkins' initial assault on him left him dazed and his vision impaired further supported a finding that Reginald did not know that his use of the knife created a substantial risk of serious physical injury or death (Tr. 2: 71). A reasonable juror could conclude from

this that Reginald used **non-deadly force** to prevent Jenkins from continuing to inflict physical injury against him.

Instruction 20, however, did not authorize the jury to find that Reginald acted in lawful self-defense as to Count I based merely on non-deadly force. Instruction 20 specifically told the jury that Reginald acted in lawful self-defense only if he reasonably believed he was in imminent danger of death or serious physical injury from Jenkins **and** that he reasonably believed the use of deadly force was necessary to defend himself (L.F. 92). Jurors who may have believed Reginald had a reasonable fear of mere physical injury, may not have believed that he reasonably feared **serious physical injury**, based on Reginald's equivocation that he *thought* he felt Jenkins begin to use a hard object after the car hit the wall (Tr. 2: 29), or by crediting Jenkins' claim that he did not previously strike Reginald with a jack-handle (Tr. 2: 131). Instruction 20, however, specifically instructed the jury that Reginald acted in self defense only if they found that he reasonably believed he was in imminent danger of death or serious physical injury from Jenkins (L.F. 92). This record precludes a finding that the failure to give instruction Z had no effect on the outcome.

The Sixth Amendment right to fair trial exists to guarantee the defendant an "ample opportunity to meet the state's case" and secure a

reliable verdict. **Strickland v. Washington**, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The Fourteenth Amendment further protects the defendant's right to present a defense to the charges. **State v. Allen**, 800 S.W.2d 82, 84 (Mo. App. W.D. 1990). Judge Wilson's refusal to submit Instruction Z, and its submission instead of Instruction 20, violated appellant's these rights by impairing appellant's claim of self-defense. The jury was not told they could find Reginald to have acted in self-defense if they believed he merely used the non-deadly force necessary to prevent his own physical injury. The instruction may well have been decisive to the jury's verdict and cannot be declared harmless beyond a reasonable doubt.

This requires reversal of appellant's conviction of assault in the first degree. Reversal of Reginald's assault conviction in Count I also requires reversal of his conviction of armed criminal action in Count II, as conviction of the latter requires the commission of the underlying felony. **State v. Redmond**, 937 S.W.2d at 210.

In it's entirety, Instruction Z read as follows:

PART A - GENERAL INSTRUCTIONS

One of the issues as to Count I is whether the use of force by the defendant against Robert Jenkins was in self-defense. In this state,

the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

A person can lawfully use force to protect himself against an unlawful attack. However, an initial aggressor, that is, one who first attacks or threatens to attack another, is not justified in using force to protect himself from the counter-attack which he provoked. In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that his is in such danger.

If he has such a belief, he is then permitted to use that amount of force which he reasonably believes to be necessary to protect himself.

But a person is not permitted to use deadly force, that is, force which he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

As used in this instruction, the term “reasonable belief” means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B - SPECIFIC INSTRUCTIONS

On the issue of self-defense as to Count I, you are instructed as follows:

If the defendant reasonably believed he was in imminent danger of harm from the acts of Robert Jenkins and he used only such non-deadly force as reasonably appeared to him to be necessary to defend himself, then he acted in lawful self-defense, or if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of Robert Jenkins and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find

beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty under Count I.

As used in this instruction, the term “serious physical injury” means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

PART C - SPECIAL MATTERS

Evidence has been introduced of the prior relationship between defendant and Robert Jenkins including evidence of acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed he was in imminent danger of harm from Robert Jenkins.

Evidence has been introduced of threats made by defendant against Robert Jenkins. You may consider this evidence in determining who was the initial aggressor in the encounter.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

(L.F. 133-134).

II.

Judge Wilson erred in failing to conduct a hearing on the newly discovered evidence of Tracie Westfall's statement that she saw Jenkins assault Reginald with a jack handle on June 26, 1998, in violation of appellant's 6th and 14th Amendment rights to due process and a fair, reliable trial, in that the newly discovered evidence betrays the perjury in Jenkins' rebuttal testimony denying his June 26, 1998 assault on Reginald as well as Tracie's own perjury at deposition. The late discovery did not stem from a lack of due diligence since Tracie lied to police and in her deposition when she said she did not see the assault. The newly discovered evidence is not cumulative because the issues of self-defense and Reginald's belief that it was necessary were disputed throughout trial. The newly discovered evidence supports a reasonable probability of a different result by corroborating Reginald's claim through a hostile, prosecuting witness whose bias favored Jenkins.

The jury in this case had to determine whether the state proved beyond a reasonable doubt that Reginald Westfall did not act in self-defense when he cut Robert Jenkins (L.F. 92-93). **State v. Allison, 845 S.W.2d 642, 645 (Mo. App. W.D. 1992).** Reginald testified he went for a tool in his pocket came up with the box knife believing Jenkins would otherwise inflict

serious injury or death (Tr. 2: 34, 37, 96). Reginald based his fear in large part on the serious injuries Jenkins previously caused when he struck Reginald with a jack-handle on June 26, 1998 (Tr. 2: 34, 37, 96, 98-99). Jenkins denied that he previously attacked Reginald, portraying himself instead as a Good Samaritan who stopped Torey Peebles as he punched Reginald with his fists (Tr. 2: 129-130). Tracie Westfall told the police who responded on June 26, 1998, that Jenkins and Torey Peebles hit Reginald only with their fists (L.F. 143). She gave similar statements in a pretrial deposition in this case (L.F. 137, 152). Neither party asked Tracie about the June 26 incident.

The jury ruled the self-defense issue against Reginald and convicted him of assaulting Jenkins and armed criminal action based on that assault (L.F. 122-123). After trial, Tracie sent Reginald a letter postmarked April 13, 2000, wherein she admitted lying at trial and a separate statement declaring that she in **did see** Jenkins strike Reginald with a jack handle in the June 26 incident (L.F. 154-159). The statement asserted in full:

To Whom it may Concern

I'm writing in regards to a insident that happen in the summer of 1998 that I and husband stayed at 3431 Louisiana. I'm writing because I want to let who read this what really happen

that day. That day in my back yard a fight was started by my brother Torrey Peebles and Robert Jenkins Mr. Reginald Westfall my husband was hit by Robert Jenkins Reginald was hit in the head and across his back with a jack used to jack up a car.

Tracie Westfall

(L.F. 154).

Tracie Westfall's post-trial statements present newly discovered evidence contradicting the alleged victim in Counts 1 and 2 on the issue of whether Reginald acted in self-defense and whether he reasonably concluded deadly force was necessary. This newly discovered evidence supports the reasonable probability of a different result and the circumstances firmly warrant this court's invocation of its authority to remand to prevent a perversion and miscarriage of justice. **State v. Mooney, 670 S.W.2d 510, 515-516 (Mo. App. E.D. 1984).**

Appellant must acknowledge that the *pro se* "Supplemental Motion for New Trial" which presented Tracie's post-trial statements was filed after the deadline for new trial motions. **Rule 29.11(b)** authorizes the filing of a motion for new trial within fifteen days of the verdict. This deadline can only be extended "for an additional period not to exceed ten days." Reginald's verdicts were entered on March 9, 2000 (L.F. 122-123). Judge

Wilson granted appellant ten additional days to file the motion for new trial, making the absolute deadline April 3, 2000. Tracie Westfall's letter was not mailed until April 13, 2000 (L.F. 159).

In 1986, the Court of Appeals established a means to protect the integrity of Missouri's judicial system when new evidence comes to light too late to be included in a timely motion for new trial. **State v. Mooney, 670 S.W.2d 510**. The Court noted that untimely motions for new trial had occasionally been recognized upon the discovery that a conviction was based on perjured testimony. **670 S.W.2d at 514-515, citing State v. Coffman, 647 S.W.2d 849 (Mo. App. W.D. 1983), and Donati v. Gualdoni, 358 Mo. 667, 216 S.W.2d 519, 521 (1949)**. "We are of the opinion that in a case of this kind appellant must have some forum in the judicial system to present this issue, particularly where the case is still in the process of appeal." **State v. Mooney, 670 S.W.2d at 515**. The Court of Appeals recognized its inherent authority to prevent miscarriages of justice by remanding the case to permit the defendant to file a motion for new trial based on the newly discovered evidence. The court of appeals could not properly consider the newly discovered evidence since it was not properly part of the record before the circuit court. **670 S.W.2d at 516**. The

appropriate remedy was to remand the case to the circuit court so that it can conduct a hearing on the newly discovered evidence.

The **Mooney** procedure has been limited to exceptional circumstances brought to light during the direct appeal which lead the appellate court to conclude that its inherent power should be exercised to prevent a miscarriage of justice. **State v. Davis, 698 S.W.2d 600, 603 (Mo. App. E.D. 1985).**

The defendant must demonstrate 1) the newly discovered evidence came to his knowledge after the trial ended, 2) the defendant's lack of prior knowledge does not reflect a lack of due diligence on his part, 3) the evidence is so material that it is likely to produce a different result at a new trial, and 4) the evidence is not cumulative "nor merely of an impeaching nature." **State v. Davis, 698 S.W.2d at 603.** The procedure has rarely been requested and even more rarely granted. **E.g., State v. Post, 804 S.W.2d 862 (Mo. App. E.D. 1991) (remand granted to hear new evidence of extreme jury misconduct during murder trial); State v. Williams, 673 S.W.2d 847, 848 (Mo. App. E.D. 1984).**

The circumstances here satisfy the prerequisites for a remand under **Mooney**. Tracie had not previously admitted that she saw Jenkins take a jack-handle to Reginald's head. Tracie told the police who arrested Jenkins that she did not see Jenkins hit Reginald with anything (L.F. 143). She

deposed prior to trial that she did not see Jenkins ever hit Reginald on June 26, 1998 (L.F. 137, 152, 153). Tracie kept Reginald and his attorney ignorant of what she had seen by lying to the police who charged Jenkins for the assault and again when she lied at deposition (L.F. 137, 143).

More importantly, Tracie's testimony that she saw Jenkins strike Reginald with a jack handle would be directly material to the issue of self-defense and Reginald's reasonable belief that he had to act in self-defense to avoid suffering his own serious physical injury or death. Reginald testified he resorted to self-defense based on Jenkins' prior, grave assault upon him with a jack handle (Tr. 2: 34, 96, 98-99). The prosecution called Jenkins in rebuttal to testify that he did not strike Reginald at all and that he merely acted as a good Samaritan to stop Torey's assault on Reginald (Tr. 2: 129-130). Tracie's testimony that she saw Jenkins beat Reginald in the back of the head with a jack handle would have provided substantial, new evidence supporting a finding that Reginald had a reasonable belief that if he did not resort to self-defense, even deadly force, he risked serious physical injury or death himself. Tracie's testimony would not have been "cumulative", since the question of whether Reginald acted in self-defense and whether he had a reasonable belief that he would otherwise suffer serious physical injury were critical factual issues in dispute. **State v. McCauley, 831 S.W.2d 741, 743**

(Mo. App. E.D. 1992) (evidence is “cumulative” only if it relates to an uncontested issue or one established beyond dispute). Tracie’s testimony that Jenkins in fact brutally assaulted Reginald six months earlier would warrant substantial credit, given her hostility toward Reginald and her bias in favor of her new beau, Robert Jenkins.

The circumstances here squarely demonstrate that a miscarriage of justice will result unless this court exercises its discretion to address the perversion of the criminal justice system reflected in this record. Reginald Westfall clearly suffered more injury on June 26, 1998 than mere fists would inflict (L.F. 143). Tracie Westfall claimed that she did not see Jenkins or her brother use anything other than fists against Reginald (L.F. 143). The veracity of this statement was shaky given her added declaration that she would not help the prosecution of the assault charges from June 26, 1998 (L.F. 143) and refused to make any further statements about it. The record in this case raises the specter of a pair of lovers perverting the truth-seeking function at trial, and even the criminal justice administration’s goal of bringing justice by concealing their vicious assault on Reginald from the police investigating that assault, and again in charges they later lodged against Reginald. Tracie’s statements also reflect the influence of perjury in this case. The fundamental fairness required by Fourteenth Amendment due

process compels the condemnation of any conviction based on false or fabricated evidence. **See Napue v. Illinois, 360 U.S. 364, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).** The prosecution must take responsibility for the influence of perjured testimony and seek to correct it, whether or not the state intended to introduce perjury against the accused. **Id.** The use of perjured testimony negates the reliability, and thus the fairness, of a trial, in violation of the Sixth Amendment. **Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935).**

Reginald Westfall's right to fair trial and due process were impaired by perjury from both Tracie Westfall and Robert Jenkins. The interests of justice, which include upholding the integrity of Missouri's criminal justice system, fully support remand under **State v. Mooney**.

CONCLUSION

WHEREFORE, appellant respectfully asks that this Court reverse his conviction and remand the case for a new trial on Count 1 (assault in the first degree) and Count 2 (armed criminal action based on that assault). In the alternative, that this court remand his case for a hearing on the newly discovered evidence of Tracie Westfall's testimony that she witnessed Jenkins' assault on Reginald on June 26, 1998.

Respectfully submitted,

Dave Hemingway
MO Bar # 32586
Attorney for Appellant
1139 Olive, Suite 200
St. Louis, MO 63101
(314) 340-7640

Two copies of this brief have been mailed to the Attorney General,
Box 899, Jefferson City MO 65102 on 10 January 2002.

Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Dave Hemingway, counsel for appellant, hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) of this Court and contains 9, 331 words, including the cover and including this certification, as determined by Microsoft Word software; and
2. That the disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and accurate copy of the attacked brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 10th day of January 2002, to

Office of Attorney General
Box 899
Jefferson City, MO 65102

Dave Hemingway
Missouri Bar No. 32586
Attorney for Appellant
1139 Olive, Suite 200
St. Louis, MO 63101
(314) 340-7640

Appendix

(Instruction Z; L.F. 133-134)